



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 255 OF 2013

SHAMIM BEGUM FEROZEDIN.....PLAINTIFF

-versus-

AKBAR KHAN JOSAB KHAN.....1ST DEFENDANT

MWACHARO KAMONDO MSINGA..... 2ND DEFENDANT

JUDGEMENT

1. The Plaintiff's claim against the Defendants jointly and severally is for immediate removal of all structures unlawfully built and/or erected on the Plaintiff's piece of land at Mackinon Road near the Mosque at Samburu. The Plaintiff also seeks as against the Defendants, their servants and/or agents, a permanent injunction to restrain them from trespassing on the suit land and payment of damages for trespass on the suit land.

2. The Plaintiff states that she is the legal owner of the undemarcated parcel of land situate at Mackinon Road near the Mosque at Samburu measuring approximately one acre (hereinafter "the suit land") having purchased the same from JULEKHA REHMTULLA OSMAN SABER on 18th June 1992 for a consideration of Kshs. 18,000.00. That she took possession of the suit land and built thereon a temporary structure and started undertaking small scale farming. She stated that she employed a farm assistant as a salary of Kshs. 800.00 per month.

3. It is the Plaintiff's case that in June 2006, she left the country to visit her sister in Bahrain and stayed there until October 2010. When she returned to Kenya, the Plaintiff stated that she went to Nairobi to attend to her sick mother who later died in December 2011.

4. The Plaintiff stated that in August 2013, she went to the suit land and found that the 1st Defendant had chased away her farm assistant and had taken possession of the suit land. She reported the matter to the Area Chief of Mackinon Road Location who summoned the Defendants to his office on 15th August 2015 to hear their side of the story. The 1st Defendant told the Chief that the suit land was sold to him by the 2nd Defendant on 30th January 2002. That after hearing both sides, the Chief ordered the 1st Defendant to vacate the suit land and demand his money from the 2nd Defendant but the 1st Defendant declined to comply.

5. The Plaintiff contends that the sale of the suit land by the 2nd Defendant to the 1st Defendant was

fraudulent because the same did not belong to the 2nd Defendant.

6. The Plaintiff requested for judgment against the Defendants in default of appearance and defence. The same was entered on 11th March 2014. The matter then proceeded for formal proof hearing on 29th September 2015 during which the Plaintiff testified and confirmed the above averments contained in her Plaint. She also produced the following documents in support of her case:

i. Agreement for sale dated 18th June 1992 between herself and one JULEKHA W/O REHMTULLA OSMAN SABER.

ii. Acknowledgement of Receipt of Kshs. 18,000/- dated 19th November 1992

iii. Proceedings before Senior Chief Mackinon Road Location dated 15th August 2013.

7. Although the plaintiff has produced documents to prove that she purchased the suit land, the same documents contradict themselves. For instance the sale agreement indicates the money was paid before the agreement was executed. In the acknowledgement form, the sum of Kshs.18000 is said to have been paid on 19th November 1992, five months after the agreement.

8. The plot in dispute is also not disclosed both in the sale agreement and the pleadings filed. The plot is referred to as a plot measuring one acre situated along Mackinon road. No sketch maps or mention of any numbers of neighbouring plot. It is difficult for this court to determine with finality whether the defendant is on the same plot claimed by the Plaintiff or a neighbouring plot.

9. It is my finding that although this suit was not defended, the Plaintiff still had an obligation to prove her case. She pleaded fraud in the plaint but never made any effort to prove any acts of fraud committed by either of the defendants. She did not call the area chief to confirm the minutes of the meeting of 15 – 8 – 2013 that would have verified that the defendant is living on the plaintiff's plot.

10. In conclusion, I find this case as not proved and dismiss it with no order as to costs.

Judgment dated & delivered in Mombasa this 17th day of December 2015.

A. OMOLLO

JUDGE



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